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No. 04-1144

In the
Supreme Court of the United States

KELLY A. AYOTTE, ATTORNEY GENERAL OF THE STATE OF NEW HAMPSHIRE, IN HER OFFICIAL CAPACITY,
Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, CONCORD FEMINIST HEALTH CENTER, FEMINIST HEALTH CENTER OF PORTSMOUTH, AND WAYNE GOLDNER, M.D.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
For The First Circuit

BRIEF OF AMICI CURIAE NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, ET AL. IN SUPPORT OF RESPONDENTS PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, ET AL.

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INTEREST OF *AMICI CURIAE*[1]

The following organizations respectfully submit this brief as *Amici Curiae* in support of Respondents. *Amici* represent teen victims of abuse who are directly and adversely affected by the lack of a health exception in the New Hampshire Parental Notification Prior to Abortion Act (the "New Hampshire Act" or the "Act"), and they urge this Court to affirm the decision of the United States Court of Appeals for the First Circuit holding that the New Hampshire Act is unconstitutional.[2]

The **National Coalition Against Domestic Violence** ("NCADV") was formally organized in January 1978, and is dedicated to providing advocacy, leadership, representation, and support to battered women and their children across the United States. NCADV's work includes coalition building at the local, state, regional, and national levels; support for the provision of community-based services such as safe houses and shelter programs; public education and technical assistance; policy development and innovative legislation; and efforts to eradicate the social conditions that contribute to domestic violence. NCADV's membership is comprised of over one thousand grassroots organizations, community programs, and individuals dealing with the concerns of battered women and their families. NCADV believes that abused teens are owed safe access to reproductive services, and that the absence of a health exception

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[1] All parties in this matter have consented to the filing of this *amici curiae* brief, as evidenced by letters of consent filed with the Clerk. *Amici* are not related in any way to any party in this case, and no party or its counsel has authored any part of this brief. No person or entity other than *amici* and their counsel has made any monetary contribution to the preparation of this brief.

[2] Counsel gratefully acknowledge the research assistance of Sara I. McClelland, Doctoral Program in Psychology, The Graduate Center, City University of New York and Michelle Zeitler, MPH, Research Coordinator, Department of Obstetrics and Gynecology, Columbia University Medical Center.

in parental notification laws violates teen's constitutional rights and places them at risk for further abuse.

Break the Cycle is the nation's first organization to provide law-based domestic violence services *exclusively* to young people, ages 12 to 22. The mission of Break the Cycle is to engage, educate and empower youth to build lives and communities free from domestic violence. Break the Cycle provides youth with preventive education, free legal services and information and peer leadership opportunities. In addition, Break the Cycle also advocates change in state and federal policies to assure greater legal rights for young victims of abuse. The group joins in this amicus brief to highlight the significant harm posed to abused teens when parental notification laws do not provide an health exception for medical emergencies.

Pegasus Legal Services, a nonprofit organization founded in 2002 and incorporated in New Mexico, is dedicated to improving the well-being of children and provides legal services to children and their caregivers. Among other things, Pegasus Legal Services provides legal services for youth regarding medical and mental health services, emancipation, teen pregnancy and protective orders. The group joins in this brief as an advocate for the health and safety of abused and neglected teens, and supports Respondents' position that a parental notification law without a health exception is unconstitutional.

Women Empowered Against Violence, Inc. (WEAVE), a nonprofit organization founded in 1997 and incorporated in the District of Columbia, provides holistic services to adult and teen survivors of domestic and dating violence. WEAVE's Teen Dating Violence Program provides legal, counseling, economic, and educational services to help enable teen survivors to free themselves safely from the cycle of abuse, attain independence and self-sufficiency, and live empowered lives. WEAVE has learned from working with teens that abused adolescents face many barriers to accessing reproductive health care. Because parental notification laws that lack health exceptions and

confidentiality protections will place abused teens at risk of severe harm at the hands of their abusers, WEAVE believes that the New Hampshire Act prevents abused teens from safely exercising their constitutionally guaranteed right to make choices regarding the termination of pregnancy.

SUMMARY OF ARGUMENT

This Court has identified a specific and independent constitutional requirement that state restrictions on access to abortion must contain an exception to preserve women's health. *Stenberg* v. *Carhart*, 530 U.S. 914, 929-30, 938 (2000); *Planned Parenthood* v. *Casey*, 505 U.S. 833, 879-80 (1992); *Roe* v. *Wade*, 410 U.S. 113, 164-65 (1973). The statute being challenged in this case, the New Hampshire Parental Notification Prior to Abortion Act (the "New Hampshire Act" or the "Act"), lacks such a health exception, and it therefore is plainly—and facially—unconstitutional, as the First Circuit correctly held. In this brief, *amici* discuss the significant negative impact that the Act's lack of an emergency medical exception would have on teenagers who are the victims of abuse or neglect.

Section 132:25 of the Act provides that physicians may not perform an abortion on a teenager until 48 hours after written notice of the abortion has been delivered to the teenager's parent or guardian. N.H. Rev. Stat. Ann. § 132:25. The only exceptions to this notification requirement are: (1) when the physician certifies that the abortion is necessary to prevent the minor's death and there is insufficient time to provide notice; or (2) when the person entitled to notice certifies in writing that he or she has been notified. *Id.* § 132:26(I). The Act also contains a judicial bypass procedure. *Id.* § 132:26(II). The bypass procedure provides that a teen may obtain an abortion without parental notification if she can demonstrate that she is mature and capable of providing informed consent on her own, or, if she is not sufficiently mature, that her best interest would be served by allowing her to obtain an abortion without parental

involvement. *Id.* Of particular significance here, the Act does not contain an exception for situations in which an abortion is needed immediately to protect the teen's health.

Abused and neglected teens are uniquely affected by this notification scheme and the absence of an emergency medical exception. Were the New Hampshire Act to be upheld (and it should not be), in a medical emergency, abused teens would be forced either: (1) to inform their parents about the abortion but risk the serious abuse that notification might entail; or (2) to use the judicial bypass mechanism but face the health risks resulting from the delay that the bypass procedure would impose. Similarly, many neglected teens would have to wait for a judge to authorize their abortion because they cannot rely on a parent to provide a certification in time to protect their health. The State of New Hampshire has no legitimate interest in forcing teens into this dangerous position, and it cannot, consistent with this Court's precedents, restrict these teenagers' access to medically appropriate care without providing an emergency medical exception.

ARGUMENT

I. ABUSED AND NEGLECTED TEENS ARE AT AN INCREASED RISK OF FACING MEDICAL EMERGENCIES THAT WILL REQUIRE IMMEDIATE ABORTIONS

Each year, approximately 900,000 teenagers become pregnant in the United States, and although rates are decreasing, more than 4 in 10 adolescent girls will have been pregnant at least once before they reach the age of 20.[3] Notably, a significant portion of teenage pregnancies occur in minors—and

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[3] Douglas Kirby, Nat'l Campaign to Prevent Teen Pregnancy, *Emerging Answers: Research Findings on Program to Reduce Teen Pregnancy (Summary)* 3 (2001).

many of these pregnant teens experience abuse or neglect at home.[4] For these teenagers—teenagers who are the victims of abuse or neglect—the home is not a place of caring, love and support as it is for other teens. Instead, it is a place of fear, violence and intimidation.[5] As we explain further below, for abused and neglected teens, the New Hampshire Act's lack of a health exception is extremely dangerous and, thus, unconstitutional.

A. Intrafamily Abuse And Neglect Are Major Problems in the United States

Approximately 1.6 million minors are abused or neglected in the United States every year—with many of the victims being teenage girls.[6] Teenage girls in particular experience abuse and

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4 *See, e.g.*, The Alan Guttmacher Inst., *U.S. Teenage Pregnancy Statistics: Overall Trends, Trends by Race & Ethnicity & State by State Information* 3 (2004); Susan D. Hillis et al., *The Association Between Adverse Childhood Experiences & Adolescent Pregnancy, Long-Term Psychosocial Consequences, & Fetal Death*, 113 Pediatrics 320, 322 (2004); Stanley K. Henshaw, *Abortion Trends in 1987 & 1988: Age & Race*, 24 Family Planning Perspectives 85 (1992).

5 Am. Med. Ass'n, Council on Ethical & Jud. Aff., *Mandatory Parental Consent to Abortion*, 269 JAMA 82, 83 (1993) ("AMA, *Mandatory Parental Consent to Abortion*").

6 Andrea J. Sedlak & Diane D. Broadhurst, U.S. Dep't of Health & Human Servs., *The Third National Incidence Study of Child Abuse & Neglect* 3-3 & Table 3-1 (1996) ("*NIS-3*"); Am. Med. Ass'n, Council on Scientific Aff., *Adolescents as Victims of Family Violence*, 270 JAMA 1850, 1851 (1993) (noting that 42 percent of reports of sexual abuse from one state involved adolescents) ("AMA, *Adolescents as Victims of Family Violence*"); Am. Med. Ass'n, *Featured Report: AMA Data on Violence Between Intimates* (2000), http://www.ama-assn.org/ama/pub/category/13577.html ("AMA, *AMA Data on Violence Between Intimates*"). What is perhaps most significant about these statistics is that abuse is significantly underreported—particularly when the victim is an adolescent or the abuse is sexual in nature. *NIS-3*, *supra*, at 2-1 – 2-3; AMA, *Adolescents as Victims of Family Violence*, *supra*, at 1851; AMA, *AMA Data on Violence Between Intimates*, *supra*;

neglect at disturbingly high rates.[7] Studies consistently show that approximately one-fifth to one-quarter of teenage age girls have been physically or sexually abused.[8] For example, one comprehensive study of adolescent girls found that one in five high school girls reported having been physically or sexually abused, that most abuse occurs at home, and that the abuser is usually a family member.[9] Other studies similarly have revealed that some 17% to 27% of girls were sexually abused during childhood.[10] Studies also consistently show that, in most

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Sandra Kaplan, *Adolescent Abuse*, 4 Adolescent Psychol. & Soc. Issues 65, 66 (1994).

7 Cathy Schoen et al., *The Commonwealth Fund Survey of the Health of Adolescent Girls* 1 (1997) (detailing prevalence and harm of sexual and physical abuse of teenage girls); AMA, *Adolescents as Victims of Family Violence*, *supra* note 6, at 1852 (reporting that adolescents represent a quarter of all reported cases of abuse or neglect and that, with respect to sexual abuse, girls are victims more often than boys).

8 *See* Schoen et al., *supra* note 7, at 1; David M. Fergusson, *Childhood Sexual Abuse & Psychiatric Disorder in Young Adulthood: Prevalence of Sexual Abuse & Factors Associated with Sexual Abuse*, 34 J. of Am. Acad. Child Adolescent Psychiatry 1355, 1358 (1996); David Finkelhor et al., *Sexual Abuse in a National Survey of Adult Men & Women: Prevalence, Characteristics, & Risk Factors*, 14 Child Abuse & Neglect 19, 21 (1990); Nancy D. Kellogg et al., *Early Sexual Experiences Among Pregnant & Parenting Adolescents*, 34 Adolescence 293, 296 (1999); *see also* Arthur H. Green, *Child Sexual Abuse: Immediate & Long-Term Effects & Intervention*, 32 J. Am. Acad. Child Adolescent Psychiatry 890, 891 (1993).

9 Schoen, et al., *supra* note 7, at 1-2, 11, 13.

10 *Id.* at 1; Finkelhor et al., *supra* note 8, at 20-21 (27% of women); Fergusson *supra* note 8, at 1358 (17% of women); Kellogg et al., supra note 8, at 296 (reporting findings that 15 to 40% of girls under age 18 have been sexually abused or assaulted); *see also* Green, *supra* note 8, at 891 (reviewing literature).

cases of abuse, the perpetrator is a parent or a nonparental caregiver, such as a foster parent or other relative.[11]

The harms of abuse and neglect are both immediate and long-term. Physical abuse may include punching, kicking, shaking, throwing, burning, stabbing or choking,[12] and sexual abuse can include fondling, genital exposure, intimate kissing, forced masturbation, and oral, penile or digital penetration of the mouth, vagina or anus.[13] Immediate injuries range from bruises and broken bones to organ failure and even death, with estimates that some 565,000 minors per year receive serious injuries from abuse, including loss of consciousness, suffocation, broken bones, third degree burns and extensive second degree burns.[14] And the long-term effects include increased risks of alcohol and drug abuse, premature sexual activity, mental illness, depression, suicide attempts, sexual dysfunction and delinquent behavior.[15]

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[11] *NIS-3*, *supra* note 6, at 8-12 (over 70% of abused children were abused by parents); U.S. Dep't of Health & Human Servs., *Child Maltreatment 2003* 63 (2005) (parents were the perpetrators in 79.7% of cases of reported abuse or neglect) ("*Child Maltreatment 2003*"); Schoen et al., *supra* note 7, at 2 (57% of abuse of high school girl was committed by a family member); AMA, *AMA Data on Violence Between Intimates*, *supra* note 6, at 13 (87.1% of cases of child abuse involved one or both parents).

[12] *NIS-3*, *supra* note 6, at 2-10.

[13] *Id.*; Kathleen Coulborn Faller, U.S. Dep't of Health & Human Servs., *Child Sexual Abuse: Intervention & Treatment Issues* 12 (1993); Nat'l Research Council, *Understanding Child Abuse & Neglect* 57-77 (1993).

[14] *NIS-3*, *supra* note 6, at 3-13. Further, an estimated 1,000 to 1,500 children are killed by their parents every year. *Id.* at 3-12; *Child Maltreatment 2003*, *supra* note 11, at 55; *see also* Am. Med. Ass'n, *Physicians & Family Violence: Ethical Considerations*, 267 JAMA 3190 (1992) ("AMA, *Physicians & Family Violence*").

[15] *NIS-3*, *supra* note 6, at 3-13; Green, *supra* note 8, at 892; *see also* AMA, *Physicians & Family Violence*, *supra* note 14; Marija G. Dunn et al.,

B. Abused and Neglected Teens Are Particularly Likely To Have High-Risk Pregnancies

Abused and neglected teens are also at an increased risk of developing complications requiring them to have an emergency abortion. To begin with, abused and neglected teens are more likely than other teens to become pregnant while they are adolescents.[16] Indeed, nearly two-thirds of pregnant teenagers were physically abused or neglected in the United States while they were growing up, while over a third were subject to emotional abuse.[17] Thus, abused and neglected teens are more likely than other teens to become pregnant.

Origins & Consequences of Child Neglect in Substance Abuse Families, 22 Clinical Psychology Rev. 1063, 1076 (2002).

[16] Evvie Becker-Lausen & Annette U. Rickel, *Integration of Teen Pregnancy & Child Abuse Research: Identifying Mediator Variables for Pregnancy Outcome*, 16 J. of Primary Prevention 39, 50 (1995) (reviewing literature linking child abuse and neglect to teen pregnancy); Janice R. Butler & Linda M. Burton, *Rethinking Teenage Childbearing: Is Sexual Abuse a Missing Link*, 39 Family Relations 73, 76, 78 (1990) (54% of pregnant teens reported at least one sexually abusive experience); Kevin Fiscella et al., *Does Child Abuse Predict Adolescent Pregnancy?*, 101 Pediatrics 620, 620-24 (1998) (finding that sexual abuse is associated with a younger age at first pregnancy); Ellen C. Herrenkohl et al., *The Relationship Between Early Maltreatment & Teenage Parenthood*, 21 J. of Adolescence 291, 296 (1998) (over 95% of teenage mothers reported history of abuse); Jonathan D. Klein, Am. Acad. of Pediatrics, *Adolescent Pregnancy: Current Trends & Issues*, 116 Pediatrics 281, 282 (2005) (finding that 50% to 60% of pregnant adolescents had a history of sexual or physical abuse); Elizabeth M. Saewyc et al., *Teenage Pregnancy & Associated Risk Behaviors Among Sexually Abused Adolescents*, 36 Perspectives on Sexual & Reproductive Health 98, 100 (2004) (abused adolescents more likely than non-abused adolescents to become pregnant).

[17] Debra Boyer & David Fine, *Sexual Abuse as a Factor in Adolescent Pregnancy & Child Maltreatment*, 24 Family Planning Perspectives 4, 8 (1992).

Abused and neglected teens are also more likely than other teens to need an emergency abortion because they tend to avoid or delay seeking needed medical care. According to one study, girls who were exposed to violence were less likely to have access to healthcare, with nearly half of the victims reporting that they had gone without needed medical care at some point in their lives.[18] Among other reasons for this problem, abused teens reported that they had concerns about confidentiality, they lacked health insurance, and they did not have support from their parents.[19] Neglected teens similarly lack parental support and are therefore likely to avoid or delay seeking needed medical treatment. Therefore, such teens are more likely to need emergency abortions: both because they are less likely to have sought prenatal care, which could have resulted in detection and treatment of conditions complicating their pregnancy before those conditions had progressed, and because they are reluctant to seek medical care even once a serious complication has developed.

In sum, abuse and neglect are significant problems in the United States, affecting millions of minors every year. Most pertinently here, teenagers who are abused or neglected are at an increased risk of becoming pregnant and also are at an increased risk of developing medical problems that could require an emergency abortion. As experience shows, these teens have a particular need for an emergency medical exception to any law—such as the New Hampshire Act—restricting access to reproductive health services. For this reason, as *amici* further explain below, the Act is plainly unconstitutional.

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[18] Schoen et al., *supra* note 7, at 4-5.

[19] *Id.*

II. THE NEW HAMPSHIRE ACT IS UNCONSTITUTIONAL BECAUSE IT SERIOUSLY ENDANGERS THE HEALTH OF ABUSED AND NEGLECTED TEENAGERS FACING MEDICAL EMERGENCIES

As this Court's precedents have established, an emergency medical exception is constitutionally required because there are some instances where an abortion is necessary "for the preservation of the life or health of the mother." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 879 (1992). The need for this emergency exception is nowhere more apparent than in the law that New Hampshire has enacted because, as written, the New Hampshire Act places abused and neglected teens in a very dangerous position. Were the Act to go into effect, an abused teen facing a medical emergency would be forced either: (1) to inform her parents about the pregnancy and risk the very serious abuse that notification might entail; or (2) to use the judicial bypass mechanism but face the health risks resulting from the delay that the bypass procedure would impose. And a neglected teen—to the extent she cannot rely on her parents to provide the required certification in time to protect her health—would be forced to wait for a judge to authorize the medical care that she needs. The State of New Hampshire has no legitimate interest in placing teenagers in this dangerous position.

A. Abused and Neglected Teenagers May Not Be Able to Notify a Parent About an Abortion Even in a Medical Emergency

A teen may comply with the Act if her parent or guardian certifies in writing that he or she has been informed of the planned abortion. N.H. Rev. Stat. Ann. § 132:26(I)(b). If the parent or guardian provides such a certification, a physician may perform an abortion immediately. Petitioner and its *amici* misguidedly argue that this exception to the Act's post-notification waiting period avoids any constitutional problems with the Act's lack of an emergency medical exception. Br. of

the United States as Amicus Curiae Supporting Petitioners ("S.G. Br."), at 24; *see also* Pet. Br. at 14. Indeed, in making this argument, Petitioner and its *amici* wholly ignore the fact that a significant number of teenagers cannot obtain a certification from their parents, even in a medical emergency, because they are the victims of abuse or neglect.

1. Some teens will not be able to obtain a certification because their parents are abusive

Some teens simply cannot notify their parents about a pregnancy because doing so would jeopardize their health. Indeed, it is well established that involuntary parental notification has very negative consequences for abused teens.[20] According to one study, a significant portion of the minors who did not inform their parents about a pregnancy had already been the victims of family violence.[21] Further, a majority of minors whose parents found out about a pregnancy without being voluntarily told by the minor reported adverse consequences, including at least six percent who reported being beaten, being forced to leave home, or having their parents' health affected.[22]

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[20] By contrast, most studies show that, regardless of whether parental notification or consent is mandated by law, the majority of minors seeking abortions *voluntarily* involve at least one parent in their decision, and among the minors who do not involve a parent, virtually all involved at least one responsible adult. Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 Family Planning Perspectives 194, 196 (1992); Robert Blum et al., *The Impact of a Parental Notification Law on Adolescent Abortion Decision-Making*, 77 Am. J. of Pub. Health 619, 620 (1987); Laurie Zabin et al., *To Whom Do Inner-City Minors Talk About Their Pregnancies? Adolescents' Communication With Parents & Parent Surrogates*, 24 Family Planning Perspectives 148 (1992). That many minors voluntarily notify their parents is no answer for those minors who cannot involve their parents because they are experiencing abuse at home.

[21] Henshaw & Kost, *supra* note 20, at 204 & table 7.

[22] *Id.*

These findings are consistent with studies showing that abused victims are in the best position to assess the risks of future violence and lethality.[23]

Notifying an abusive parent about a pregnancy is particularly dangerous for abused teens because pregnancy tends to increase the incidence and severity of abuse.[24] Significant numbers of pregnant teens report that they are abused during pregnancy in incidents that are often severe and frequently repeated.[25] In this way, pregnant teens' experience is consistent with that of other abused women, who consistently report increased vulnerability to abuse during pregnancy.[26] As a result, "it is reasonable to believe that some minors justifiably fear that

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[23] *See generally* Jill Davies, Greater Hartford Legal Assistance, *Safety Planning* (1997); *see also* Lauren Bennett Cattaneo & Lisa A. Goodman, *Victim-Reported Risk Factors for Continued Abusive Behavior: Assessing the Dangerousness of Arrested Batterers*, 31 J. of Community Psychol. 349, 365 (2003); Barbara J. Hart, Pa. Coalition Against Domestic Violence, *Safety & Accountability: The Underpinnings of a Just Justice System* (May 1998). When abused pregnant teenagers decide not to inform their parents, their determination rests upon a careful safety risk assessment based upon all that they know about their parents, and within the context of a history of violence. Davies, *supra*, at 1-2.

[24] Deborah L. Covington et al., *Severity, Manifestations & Consequences of Violence Among Pregnant Adolescents*, 28 J. of Adolescent Health 55, 57 (2001); Rebecca L. Burch & Gordon G. Gallup Jr., *Pregnancy as a Stimulus for Domestic Violence*, 19 J. of Fam. Violence 243, 245 (2004); Richard J. Gelles, *Violence & Pregnancy, Are Pregnant Women at Greater Risk of Abuse?*, 50 J. of Marriage & the Fam. 841, 844 (1988); *see also Casey*, 505 U.S. at 889 (quoting trial court's findings of fact related to domestic violence against women: "Mere notification of pregnancy is frequently a flashpoint for battering and violence within the family. The number of battering incidents is high during the pregnancy and often the worst abuse can be associated with pregnancy").

[25] Covington et al., *supra* note 24, at 57 (2001).

[26] Burch & Gallup, *supra* note 24, at 245; Gelles, *supra* note 24, at 844.

they would be treated violently by one or both parents if they had to disclose their pregnancy to their parents."[27]

Courts repeatedly have recognized that abused minors face serious risks in informing their parents about an abortion. *See, e.g., Planned Parenthood of Blue Ridge* v. *Camblos*, 155 F.3d 352, 390, 390 n.3 (4th Cir. 1998) (Michael, J., concurring) (noting that there was evidence in the record that notification would expose a young women to risks of physical abuse and recounting a case of father who murdered his daughter upon learning of her intended abortion); *Planned Parenthood* v. *Miller*, 63 F.3d 1452, 1462 (8th Cir. 1995) (discussing case of father who assaulted clinic staff and forced his daughter to leave the clinic upon learning that she planned to have an abortion); *id.* (emphasizing that "a stressful, but non-abusive, parent-child relationship can become abusive or neglectful after the parent learns of the daughter's pregnancy or desire to have an abortion"); *N. Florida Women's Health & Counseling Servs., Inc.* v. *Florida*, 866 So. 2d 612, 617 (Fla. 2003) (discussing trial court findings that some minors have legitimate fears of physical or emotional abuse from mandatory parental notification); *Am. Academy of Pediatrics* v. *Lungren*, 940 P.2d 797, 829 (Cal. 1997) (referencing evidence establishing that "many minors who do not voluntarily consult their parents have good reason to fear that informing their parents will result in physical or psychological abuse to the minor (often because of previous abusive conduct or because the pregnancy is the result of intrafamily sexual activity)").

As the Court held in *Hodgson* v. *Minnesota*, 497 U.S. 417 (1990), minors who are victims of abuse or neglect must have an alternative to informing their parents about a pregnancy in order to obtain an abortion. *See id.* at 459-61 (O'Connor, J., concurring). With this backdrop, it is unrealistic, cruel and

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[27] AMA, *Mandatory Parental Consent to Abortion*, *supra* note 5, at 83.

dangerous to require abused teens to notify their parents about the need for an abortion, even if they are facing a medical emergency.

2. Some teens will not be able to obtain the certification because their parents are absent or neglectful

There also are some teens who will not be able to obtain the required certification in time to address a serious medical condition because their parents are absent or neglectful. For example, parents may be unable to respond to teens' emergencies due to a range of problems, such as mental health issues or drug or alcohol abuse.[28] Indeed, studies consistently show that neglectful parents are less likely to obtain medical care for their children—even in medical emergencies.[29] In this situation, a neglected teen may not be able to rely on her parents to sign a certification if she needs an immediate abortion to protect her health.

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[28] In 2003 alone, over 20,000 minors were reported to have suffered medical neglect—a situation where a caregiver failed to provide appropriate healthcare for a child. *Child Maltreatment 2003*, *supra* note 11, at 22; *see also* Dunn et al., *supra* note 15, at 1069, 1072 (reviewing literature on the impact of neglect and its connection to social problems such as substance abuse).

[29] Dunn et al., *supra* note 15, at 1069. For example, the U.S. Department of Health and Human Services has studied the refusal to provide needed health care or a delay in providing appropriate medical care as two of the seven varieties of physical neglect. NIS-3, *supra* note 6, at 2-16. The Department cited a parent who failed to provide a teen with needed medical for seizures as but one example of medical neglect. *Id.* at 2-17.

B. Abused and Neglected Teenagers Should Not Be Forced To Wait for a Judge to Authorize Necessary Medical Care

The only other option for abused and neglected teens facing a medical emergency is to use the judicial bypass procedure. But the judicial bypass procedure is not a substitute for an emergency medical exception. The delay inherent in this procedure is dangerous for teens facing a medical emergency.

As other *amici* are documenting, some teenagers will require immediate abortions to prevent serious health risks. *See* Br. of *Amici Curiae* Am. Coll. of Obstetricians and Gynecologists, et al. ("ACOG *Amici* Brief"). For instance, teens with preeclampsia may need an abortion in order to avoid liver and kidney failure, severe bleeding, vision loss and fluid in the lungs. *See* J.A. 23-26 (Decl. of Wayne Goldner, M.D. at ¶¶ 7-15); *see also* ACOG *Amici* Brief. For these teens, and others who are facing medical emergencies, a delay of even minutes or hours could have disastrous consequences. *See* ACOG *Amici* Brief. Thus, the judicial bypass simply does not solve the problem for abused or neglected teens who find themselves needing an emergency abortion.

Moreover, even putting aside the problems with delay, New Hampshire's judicial bypass procedure is not a safe option for abused teens because the Act does not guarantee their confidentiality.[30] In general, abuse victims are reluctant to

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[30] The lower courts did not decide the confidentiality issue raised by Respondents—having concluded that the Act is unconstitutional because it lacks a health exception and because it contains an inadequate life exception. *Planned Parenthood* v. *Heed*, 390 F.3d 53 (1st Cir. 2004); *Planned Parenthood* v. *Heed*, 296 F. Supp. 2d 59 (D.N.H. 2003). We respectfully submit that, should this Court reverse the decision below, the case should be remanded for further consideration of whether the Act is unconstitutional because it fails to guarantee the confidentiality of minors who use the bypass procedure. *See Zbaraz* v. *Hartigan*, 763 F.2d 1532, 1543, 1545 (7th Cir. 1985) (enjoining enforcement of law that

access the court system because of confidentiality concerns.[31] And the Act does little to alleviate this concern, stating only that the judicial bypass proceedings "shall be confidential," without offering any specifics whatsoever regarding the extent or form of that confidentiality. N.H. Rev. Stat. Ann. § 132:26(II)(b). The Act does not specify if the court records will be accessible to the public, what information will be revealed in the court records, or what information will be accessible to the public via electronic means. Given these omissions, it is quite feasible that an abusive parent who monitors a child's behavior could discover the child's efforts to obtain an abortion through the bypass procedure. Put another way, the Act effectively prevents abused teens from being able to use the judicial bypass because of the danger that their parents will learn about their attempt to obtain an abortion.

In short, the judicial bypass in not an adequate substitute for an emergency medical exception. As the Solicitor General has acknowledged, "constitutional difficulties may arise to the

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lacked "specific provisions to assure the minor's anonymity" until the Illinois Supreme Court enacts rules to "assur[e] the expeditious and confidential disposition of the judicial [bypass] hearings"), *aff'd by an equally divided Court*, 484 U.S. 171 (1987); *Thornburgh* v. *Am. Coll. of Obstetrics & Gynecologists*, 737 F.2d 283, 297 (3d Cir. 1984) (holding that the bypass procedure must contain "detailed provisions assuring confidentiality" and "may not rely solely on generally stated principles of . . . confidentiality"), *aff'd on other grounds*, 476 U.S. 747 (1986).

[31] Absent assurances of confidentiality, victims of abuse are unlikely to access medical, legal and other needed services due to a justified fear of retaliation from the abuser. *See, e.g.*, Joan Zorza, ABA Comm'n on Domestic Violence, *Confidentiality, in The Impact of Domestic Violence on Your Legal Practice: A Lawyer's Handbook* 64, 64 (Margaret B. Drew et al. eds., 2nd ed. 2004); Michael B. Bressman & Fernando R. Laguarda, *Jaffee v. Redmond: Towards Recognition of a Federal Counselor-Battered Woman Privilege*, 30 Creighton L. Rev. 319, 343-345 (1997); Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 Fam. L.Q. 273, 299-302 (1995-1996).

extent the [New Hampshire Act] is applied in the specific context of emergency health risks, in which the emergency character of the situation would not allow time for the notification or judicial-bypass options to run their course." S.G. Br. at 8. The delay inherent in using the judicial bypass procedure endangers the health of teens in a medical emergency, and the Act's failure to ensure the confidentiality of minors who might seek to use the bypass procedure makes it an unrealistic and unsafe option for teens who are the victims of abuse.[32]

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[32] It also is unrealistic to expect that an abused or neglected teen will bring an as-applied challenge to the Act's notification requirement were she facing a medical emergency. Bringing an as-applied challenge would be even more difficult than using the judicial bypass process. In an as-applied challenge, as opposed to a judicial bypass procedure, a teen would not have access to court-appointed attorneys, nor would she have any statutory assurance of confidentiality or expedition. Further, she would have to bring a full blown lawsuit from complaint through discovery and possibly trial—a process that could take months if not years—as opposed to showing that she fits into a factual circumstance contemplated by the judicial bypass procedure. In addition, abused teens would face the problems that all victims of abuse face in accessing attorneys and using the legal system. *See generally* Stephanie Paul, ABA Commission on Domestic Violence, *Legal Services, in The Impact of Domestic Violence on Your Legal Practice: A Lawyer's Handbook* 15, 15, 17 (Margaret B. Drew et al. eds., 2nd ed. 2004). All of this makes an as-applied challenge a completely unrealistic option for an abused teen in a medical emergency.

CONCLUSION

The New Hampshire Act's lack of an emergency health exception poses a major health risk to teens who are the victims of abuse and neglect, and the Act therefore is plainly and facially unconstitutional. For all of the foregoing reasons, *amici* respectfully submit that the decision of the First Circuit should be affirmed.

Respectfully submitted,

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